The Madras Law Journal.

PART VIII.] AUGUST, 1898. [VOL. VIII.

WHO ARE BANDHUS.—I.

The texts of the Mitakshara on the subject are few. In chapter II, section 5, placitum 3, the author says: "Kinsmen sprung from a different family, but connected by particles of the same body are indicated by the term cognate." In chapter I, section 6, placitum 1, again, "on failure of gentiles" cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother, as is declared by the following text: 'The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred.' And again, in pl. 2 the author says: "Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance: on failure of them, his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

It was at one time the current opinion that the enumeration made in the above texts of the Mitakshara was not merely illustrative but exhaustive. So much so that even the sister's son whose title is now clear and unquestionable felt the greatest difficulty in establishing his title. There are various Sudr Courts' decisions, but I would only refer to more recent cases, *i.e.*, decisions passed after the High Court was established. *Vide Doe dem Kullammal* v. *Kuppu Pillai,* 1 M. H. C. 85, *Jowahir Rahoot* v. *Mussamut Kailassoo,* 1 W. R. 74 and *Bheem Ram* v. *Huree Kishore,* 1 W. R. 359.

In the case of *Thakoorin Sahiba* v. *Mohun Lall,* 11 M. I. A., p. 386, the sister's son's claim was no doubt denied, but the case

went off on the ground of the admission of counsel as regards this point. There are other cases in which the rights of the persons whose claim it would now be impossible to deny were negatived. *Vide Choorah Monee Bose* v. *Prosonna Coomar Mitter,* 1 W. R., 43 and *Kissen Lala* v. *Javallah Prasad Lala,* 3 M. H. C. 346.

But all this is now exploded doctrine. It is now settled by the highest judicial authority that the enumeration of heirs in the Bandhus list is illustrative merely and not exhaustive.

In *Giridhari Lal Roy* v. *The Bengal Government,* 12 M. I. A. 448, their Lordships of the Privy Council observed: "The text does not purport to be an exhaustive enumeration of all *bandhus* who are capable of inheriting, nor is it cited as such, or for that purpose, by the author of the Mitakshara,—it is used simply as a proof or illustration of his proposition that there are three kinds or classes of *bandhus*; and all that he states further upon it is, the order in which the three classes take." *Vide* also *Muthuswami* v. *Sunambedu Muthukumaraswami,* 23 I. A., 83; *Ratnasubbu* v. *Ponnappa,* I. L. R., 5 M., 69; *Amrita Kumari* v. *Lakhinarayan,* 2 B. L. R. (F. B.) 28.

In some of these cases (*vide* 16 M., 23) a somewhat feeble contention was raised that the Mitakshara in citing the text of Vridha Satatapa does not purport to lay down any rule of succession, nor the order in which *bandhus* should succeed. The contention seems to be that the text of Vriddha Satatapa is not a rule of inheritance (illustrating nearness or remoteness of affinity), but only applies to *Pakshini* or pollution. No greater absurdity can be imputed to the author of the Mitakshara than this. When the text is specially mentioned in the chapter on *bandhu* succession, what else is the object of the author in mentioning it there? Some meaning should be attributed to the author. If he did not intend it to be a rule of succession, why did he introduce it at all in that chapter relating to succession?

Again placitum 3 (chapter II, section 6) places the matter beyond all doubt. It expressly says that the order of succession is as stated in the text of Vriddha Satatapa, *viz.,* the *atma-bandhus* should take first, next the *pitru-bandhus,* and then the *matru-bandhus.* It is sufficient to pass over this part of the subject by citing the observations of the Judicial Committee in *Muthuswami* v. *Muthukumaraswami,* in 23 I. A., 83: "Their Lordships do not think it

necessary to discuss the fanciful suggestion made in the Courts below, and refuted there with much care and learning to the effect that the quoted text is addressed to religious ceremonies of purification rather than to positive rules of succession. To whatever extent rules of succession may have been founded on religious observances or may now be explained by them, it is clear that fixed rules of law for succession have been established for ages, and equally clear that the Mitakshara professes to express such rules in the quoted text." (*Vide* also observations of *Muttusami Aiyar*, J., and *Parker*, J., in *Muthuswami* v. *Muthukumaraswami*, 16 M., 23 at p. 29.

It being now uncontroverted that the texts are only illustrative not exhaustive, we have to consider the persons comprised in the class. But before we proceed to know definitely who one's *bandhus* are, and what their order of succession is, we have first to determine the signification of the term *bandhu*, as it is understood in the Mitakshara.

A passage in the Mitakshara by a side-wind gives us some though a faint idea of what a *bandhu* is. For in chapter II, section 5, pl. 3, we find what is really a definition of *bandhu*. The author, after defining what a *gotraja* is, says: "For kinsmen sprung from a different family, but connected by particles of the same body (*Colebrooke* renders it as 'connected by funeral oblations') are indicated by the term cognate (*bandhu*)." The Sanskrit passage is

Bhinnagotranām-sapindanām bandhu sabdena grahanāt.

For sapindas born of a different or separated stock or family (*lit.* split or cut as under) are indicated by the term *bandhu*.

For Bhinnagotra *sapindas* are indicated by the term '*bandhu*.'

Another reading is

Bhinnagotrajanam sapindanam bandhu, Sabdena grahanat (Saraswati Vilasa, Sec. 586, Foulkes' edition.

The word '*sapinda*' occurs in the Mitakshara in a previous *kanda* (*Achara kanda*), and it is defined there. According to the definition in *Achara kanda*, a sapinda is one who is connected by 'particles of the same body.' *Colebroke* lost sight of this, and hence fell into the error of rendering the term 'sapinda' in the above-quoted verse as 'one connected by funeral oblations.'

The Full Bench of the High Court of Calcutta in the case of *Umaid Bahadur* v. *Udoi Chand,* I. L. R. 6, C., 119, is reported to have said at pages 125 and 126: "If in verse 33, section 5, chapter 2, the author of the Mitakshara used the word *'sapinda'* in the meaning which he has given to it in the passage cited above (verses 52 and 53, Acharakanda) the translation of Mr. Colebrooke of the verse in question is not correct. Having taken great pains in accurately defining the word *'sapinda'* in the beginning of his work, and having said in clear words in the passage in question that 'one ought to know that wherever the word *sapinda* is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent,' it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu Law that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated . . . . . These considerations leave no room for doubt that in verse 3, section 5, chapter II, the author of the Mitakshara has used the word *'sapinda'* not in the sense of 'connection by funeral oblations,' but of 'connection by particles of one body, as defined in Acharakanda. That this is the case is evident from the fact that some of the enumerated *bandhus* in verse 1, section 6 of chapter II, admittedly do not confer any religious benefit on the deceased, and therefore cannot be said to be connected by funeral oblations with him."

Again in the recent case of *Babu Lal* v. *Nanku Ram and another,* I. L. R., 22 C., p. 339, their Lordships *Norris* and *Bannerjee* observed "the term *'bandhu'* is defined in the Mitakshara (chapter II, section 5, ver. 3) as a *'bhinnagotra sapinda,'* that is, one sprung from a different family and connected by common corporeal particles or by consanguinity. *Colebrooke* incorrectly rendered *sapinda* as one connected by funeral oblation, but this inaccuracy in his translation was pointed out long ago, and the above rendering has been accepted as the correct one. (See *Lallubhai Bapubhai* v. *Mankuvarbai,* I. L. R., 2 B., 388; *Lallubhai Bhapubhai* v. *Cassibai,* I. L. R., 5 B., 110; and *Mayne* on Hindu Law & Usage, paras. 468, 469, 470, 471 and 472.)

Bandhus are kinsmen sprung from a different family though connected by particles of the same body. Therefore, a female must

necessarily intervene at some point or other; for otherwise they would not be of the same stock or family. When Vijnanesvara says that *bandhus* are *bhinnagotra sapindas* or *bhinna gotraja sapindas*, he uses *gotra* in the narrower sense of the term. In this narrower sense it means family (agnatic) or stock or lineage. The *gotra* in the wider sense has reference to the fact that in the case of Brahmins, there are 24 sub-divisions who are supposed to be descended from 24 great rishis (or to be traceable to 8 principal rishis). If you ask a person what his gotra is, he will say it is Bharadvāja, Kausika or Kauntinyà, &c. There are certain great rishis, and each and every Hindu sect or division will be of this or that gotra. Probably, this is due to the fact that each rishi had originally certain disciples or followers of his own. Those disciples will get other followers, and their descendants together with the subsequent followers will naturally be called as belonging to the *gotra* of that rishi, and so on. (In this latter sense it is used in Mitakshara in the chapter on marriage: Yájnavalkya, verse 53, cited in Mitakshara Acharakanda.* But whatever explanation be given to this, it is not in this sense that the word is used. For if it were used in this sense who are the *bandhus* of Sudras; Vijnanesvara says that the rule of succession he propounds is applicable to all classes and castes (*varna*). But a Sudra has no *gotra* or he is supposed to have only one gotrà. Moreover, the word used is, '*bhinna gotra*' not '*usagotra*.' If the *gotra* is once separated, that is enough.

The *bandhus* are further *sapindas*, *i.e.*, they are connected by particles of the same body, *i.e.*, the person claiming to be a *bandhu* of the deceased must be a *sapinda* of the deceased. If he is not a *sapinda* of the deceased, *i.e.*, if there is no connection by corporal particles then surely he cannot claim to succeed as a *bandhu*. We must, therefore, now consider what is meant by '*a sapinda*.'

Sapindaship, as has been observed already, is not defined by the author of the Mitakshara in the Vyavaharakanda, but it is defined in the Acharakanda. In treating of persons who are not eligible for marriage, Yájnavalkya says:

"He who has not deviated any way from the order of *Brahmachari* should marry a female who is beautiful (accomplished

* This disposes of the objection of 'Jurisprudence' that it is not true always that a cognate is a *Bhinna gotra sapinda*, and that as a descriptive term it is vague.

or graceful) who has not seen (or been enjoyed by or given to) another, who is pleasing, who is not a sapinda and who is younger to himself."

Then the Commentator explains who a *sapinda* is, and who is not. We here give a free translation of the same, (and a translation of the same is also found in I. L. R. 5 B., p. 110 at 119.)

"(He should marry a girl) who is not a *sapinda* or who is a *non-sapinda* (with himself). *Sapinda* is she who has the same (or one) body (in common with him). She who is not a *sapinda* is *asapinda*. Her (he should marry) *sapindaship*, therefore, exists through or by reason of connection of particles of one (or same body). For example, there exists *sapinda* relationship between the son and his father through connection with particles of the father's body, (*i.e.*, through connection of the son's body with particles of the father's body). In this manner, there exists *sapinda* relationship with his paternal grandfather and the rest through a connection with particles of their body through the medium of the father. Thus with the mother, by connection of particles of her (mother's) body. Likewise with the maternal grandfather and with the rest, through the mother. Likewise also with maternal aunts (mother's sisters) and uncles (mother's brothers) and the rest through connection with particles of the same (one) body, so with paternal uncles (father's brothers) and aunts (father's sisters) and the rest. Likewise, as between husband and wife by reason of generating one body (being generators of the same body). In this manner as between the wives of brothers (*sapindaship* exists) by reason of generating same body (by union) with persons who are begotten of one body. In this manner wherever the word '*sapinda*' occurs, it must be understood ('in all such places') (in the sense of) connection, either immediately or mediately, of particles of one body. Indeed, if it be said (that if this meaning be accepted), the rule "among *sapindas*, ten days' obitual impurity is ordained" will ordinarily apply even to the maternal grandfather and the rest (the answer is) this will be so if it were not for the special text "others should perform in the case of those who were given in marriage, (*i.e.*, married women, lit those who were given)" and other similar special texts. Therefore, wherever there is no special text the text "among *sapindas*, 'ten days" &c.," will throughout apply. And

certainly *sapinda* relationship should be described (as being the result of, or as being based upon) connection of particles of the same body. For, according to the Sruti "self was begotten of self," so also "after your son, be born of your son." Apastamba also says: "It can be clearly perceived that he himself is the person who is born differently." And so also the Garbha Upanishad says: "This body is made up of 6 layers—3 from the mother, and 3 from the father. From the father come bones, tendons (or muscles) and the marrow, and from the mother, skin, flesh and blood. Thus throughout by the ascertainment of connection of particles of one body (*sapindaship* is described). If, however, *sapindaship* (arises or exists) from connection arising from the presentation of funeral or exequial cakes; then *sapindaship* is not possible with the mother's family, (*i.e.*, relatives in the mother's line), and also with the brother's son and the rest. If a conventienal meaning is assigned to the word (sapinda) as a compound (lit by taking the collective signification) the Etymological meaning which is assigned in different places will have to be abandoned."

Then as to the limits of *sapindaship* and the computation of degrees, Yâjnavalkya says:

Panchamât Saptamât Urdhvam mâtrutah Pitrutah tathâ.

"Beyond the 5th through the mother and beyond the 7th through the father (sapinda relationship ceases)." In commenting upon this text Vijnanesvara says: In the mother's family (or line) beyond the 5th and in the father's family (or line) beyond the 7th *sapinda* relationship ceases or returns (is to be understood). Therefore, this word '*sapinda*' although of general application by force of the particles of the body is bound or tied down to a particular matter as the words Nirmauthya Pankaja (lotus) and such like. In like manner the 6 persons or (ancestors) beginning from the father, the 6 persons or (descendants,) beginning from the son are *sapindas* and oneself is the 7th. When there is a division in the lines 7 is to be counted throughout in the above manner, commencing from the line diverging. So, the person who occupies the 5th place in calculation beginning with the mother, her father, grandfather, &c., is considered the 5th from the mother. So he who occupies the 7th place in calculation beginning with the father his father, &c., is considered the 7th from the father . . . .

What is said by Vasishta 'fifth from the mother and 7th from the father' and what is said by Paitinasi 'Beyond three removes from the mother and five removes from the father' must be intended to prohibit nearer degrees and not to recommend those degrees 'thus there is no conflict between the various smritis.'

As no other definition of *sapinda* is given (in the chapter on inheritance) it must be understood that it was used in the sense fixed to it by the author in the chapter on marriage. Again, it is not all persons who can be computed in this way are heritable *bandhus*. To be a heritable *bandhu*, the deceased and the claimant must be *sapindas* to each other. In other words, there must be mutuality of *sapindaship* in order that one may be a heritable *bandhu* to the deceased. This is, no doubt, not stated or recognized in the chapter on marriage. But as regards inheritance there is this qualification to what has been already considered in the chapter on marriage.

For in chapter II, section 3, verse 3, Mitakshara refers to and relies upon a text of Manu when discussing the rule of precedence among parents. The text of Manu is to be found in chapter IX, verse 187, and it runs thus:—

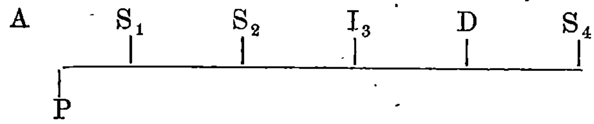
Anantarah sapindadyah tasya tasya dhanam bhavet.

The text itself is commented on by two of the leading commentators of the Mitakshara, *viz.*, Balam Bhatta and Visvesvara Bhatta. According to them the text means "The property of a near *sapinda* shall be that of a near *sapinda*." From this it follows that to give a heritable right there must be mutuality of sapindaship. (See Sarvadhikari, p. 569)

This principle has been recognized in the case of *Babu Lal* v. *Nanku Ram and another*, I.L.R., 22 C., 339. Their Lordships *Norris* and *Bannerjee*, J. J., observed "a *sapinda* of the propositus to be capable of inheriting must satisfy a further condition, *viz.*, that he must be so related to the propositus, that the propositus is also a *sapinda* of him, either directly or through the father or the mother. This mutuality of *sapindaship* between the propositus and his heritable *sapindas* is assumed as a necessary condition in the case of *Umaid Bahadur* v. *Udai Chand*, I. L. R., 6 C., 119, and the authority for this is to be found in the text of Manu (ch. IX, 187) cited in

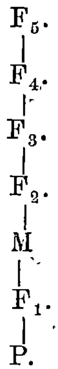
the Mitakshara, chap: II, sec. 3, verse 3, as interpreted by Balam Bhatta and Visvesvara Bhatta, the two leading commentators on the Mitakshara. That text according to these commentators means 'the property of a near *sapinda* shall be that of near *sapinda*.' From this it is clear that a man in order to be a heritable sapinda of the *propositus* must be so related to him that they are sapindas of each other. (See also *Ramappa Naicken* v. *Sithammal*, I. L. R., 2, M. 187.)

We have thus deduced this rule that there must be mutual sapindaship to give *heredity*. To illustrate our meaning,—P is the propositus, A is his father, S denotes sons, D daughter



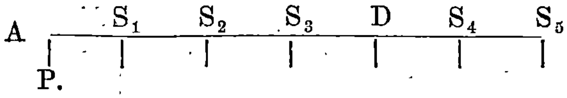
P is a sapinda of S_4; A is P's father, A is within 7 degrees of S_4, but S_4 is not the sapinda of P, as S_4 is not within 5 degrees A, as S_4 traces through a female. Here therefore, there is no mutuality of *sapindaship*. If S_4 is heir of P, P must also be the heir of S_4. But this cannot be. Therefore we must reject S_4.

There is another rule which is deducible from the text of Mitakshara and which follows as an axiom from the definition of *sapinda* relationship. That is this. If a male or a female is not a *sapinda* of another, much less can the son of that male or female be the *sapinda* of that other, as his father or mother having no corporal particles (of the given person or of their common ancestor) in common with the given person can transmit none to his son. I shall illustrate this by the following example.:—



Here F_5 cannot be the *sapinda* of P, though within 7 degrees from P (both tracing immediately through a male) as F_1 is not the

sapinda of F_5, being above 5 degrees from F_1 with whom he is related immediately through a female. If, therefore, the person's father is not a *sapinda* to another and has no heritable relationship, much less can that person be a *sapinda* to that other. One more example—



Here S_5 is within 7 degrees from A, and A is also within 7 degrees (both tracing through a male). But S_4 is not a *sapinda* of A as he is beyond 5 degrees from A (S_4 tracing through a female). If S_4 has no common corporal particles of the ancestor transmitted to him through his mother, how can he transmit any to S_5? Therefore S_5 and A, though within 7 degrees of each other, and though each of them trace through a male, yet as his father was not a *sapinda* of A and had no common corporal particles with him, could not be his (A's) *sapinda*.

The principle above enunciated is clearly embodied in the following passages of the Mitakshara:—

"*Sapinda* relationship arises between two people through their being connected by particles of one body. Thus the son stands in *sapinda* relationship to his father, because of *the particles of his father's body having entered (his)*. In like (manner stands the grandson in *sapinda* relationship to his paternal grandfather, and the rest because *through his father* particles of his grandfather's body have entered into (his own) . . . Likewise the grandson stands in *sapinda* relationship to his maternal grandfather, and the rest *through his mother*."

Of course there are cases where though A is not a *sapinda* of B, yet A's son is *sapinda* of B. This will arise only in this way. A may not be a *sapinda* to his wife's relations, say, to his father-in-law (where A marries from an utterly strange family). But A's son through his mother (A's wife) is a *sapinda* of A's father-in-law. This is obvious. The husband as such is not the *sapinda* of his wife's relations, but his issue will be through their mother. But if the mother has no *sapinda* relationship, the son cannot also have any.

There is yet another rule deducible from the authorities. It is this. Yájnavalkya says that you are to count 7 degrees through the father and 5 through the mother. But if you want to see the limit of the *sapinda* relationship among your descendants, what is the rule? Of course the Mitakshara says that the six persons, beginning with your son, would also be *sapindas*. But with regard to your descendants tracing through your daughter, what is the rule? On the analogy of 5 degrees through your mother in the case of your descendants also, you have to trace 5 degrees through your daughter. If in the maternal grandfather's line *sapinda* relationship ceases all beyond the fifth; counting from you in the daughter's line also, you have to count only 5 degrees from you. In the daughter's case the particles of blood are just as much corrupted as in the mother by the fact of a female intervening. Therefore S_3 is the limit of sapinda relationship in the daughter's line.

P.
|
D.
|
S_1
|
S_2
|
S_3

No doubt the Mitakshara in explaining 'through the mother,' &c., regards it quite generally, but upon a strict interpretation of the text the above result will follow and is more in accordance with principle and analogy. The commentators in their fear of the prohibited degree, take 7 degrees throughout for marriage in the father's line (or one's own line).

It will be seen later on that our tables are filled up without any particular reference to the working out of these definitions of *sapindaship*. This is owing to the explanations we have given about the different classes of *bandhus* and the way in which the Mitakshara divides the *bandhus*. For the Mitakshara divides *one's bandhus* into three classes and makes them his heirs. We have only learnt who the *bandhus* generally are. We have yet to see who one's heritable bandhus are as comprised in the three classes mentioned by the Mitakshara. It will be seen that if we apply the definition, he correctness of our tables will be manifest.

We, therefore, know that the *bandhus* are to be found among the persons who are within the fifth from the mother and the seventh from the father, calculated from the deceased where the relationship is lineal; with regard to collaterals, the calculation is, as already stated, different.

If they are not within those limits, we may confidently assert that they are not *bandhus*.

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TRANSLATED FROM THE VIVADARATNAKARA.

On Sureties.

On this subject, Katyayana says: "A master, an enemy, an agent of the master likewise, a person in duress, a man sentenced, a person in doubt, a parcener, a friend, disciples, an official under the king, persons who have entered the sanyasin's order, a person who is unable to pay the creditor and a fine equal in amount to the king and an unknown person; these are not worthy to be sureties for (the accomplishment of) an act."(1) Here "master" means 'one above the reach of law.' "A person in doubt" refers to one who is on the point of death. Some take it to mean 'a person who has been punished for committing an offence. *Rikthi*] one who has wealth in common with the creditor or the debtor. *Antevásina*] disciples.' The author of the Mitakshara, however, reads '*atyanta-vásinah*' and explains it 'perpetual students.' "Who is unable to pay" is understood before "a fine equal in amount to the king." This has reference to a person on whom punishment is inflicted by the king, in case he had not given. It should also be understood that he, after whose death there is no hope of recovering the money, should not be admitted as a surety.

Yájnavalkya says: "It is ordained that among brothers, husband and wife, and father and son, standing surety, money-lending and giving evidence are not allowed before partition."(2) The meaning is that before partition, standing surety, the transactions of creditor and debtor and giving evidence are not proper between brothers, husband and wife and father and son.

(1) I. Cole. Dig., 155, CXXXIX. (2) Yájnavalkya, II, 52.

On this same subject, Narada says: "Separated, not unseparated, brothers may mutually give evidence, stand surety, give and receive."(1) The meaning is that (unseparated brothers) should not stand surety, etc.

Brihaspati says: "Four kinds of surety have been laid down by sages in the Code of Law: for production, for vouching for one's trustworthiness, for payment and for delivering the loan (to the creditor). The first says: 'I shall produce him'; another says: 'He is a virtuous man'; another says: 'I will pay this'; the fourth says: 'I will deliver the money.' In default, the first two should be made to pay the amount due at the time; and the last two, and in their default their sons (should be made to pay) in case of the debtors breaking their engagements."(2)

"For delivering the loan"] for delivering the sum to the creditor. The first two, if the one fail to produce and if the other fail to prove the trustworthiness should be made to pay the amount due at that time. The last two should be made to pay if the debtor fails to give in the one case, and fails to deliver the property in the other. In default of the sureties for payment and for delivering, their sons should be made to pay.

Yájnavalkya: "Where the surety for producing or for trustworthiness dies, his sons shall not pay the debt; but those who stood surety for payment should pay."(3) The meaning is 'the sons of the surety for payment, etc., (shall pay).'

Katyayana: "A surety for payment, production, confidence (*i.e.*, trustworthiness), for dispute, and for oaths, should be made to pay what was due, in case the debtor fails to keep his promise."(4). The meaning is that a surety for payment, for producing the debtor, for proving the trustworthiness, for dispute with the creditor and for taking oaths should, if he fails in that, be made to pay the amount due to the creditor.

Narada: 'Three sorts of sureties are declared by the wise for three purposes, *viz.*, for production, for payment and for honesty. If the debtors do not pay, or if honesty be disproved, the surety (for payment or for honesty) must pay that debt; and likewise, (the

(1) Narada, XIII, 39.
(2) Brihaspati XI, 39—42.
(3) Yàjnavalkya, II, 54.
(4) I. Cole. Dig., 168, CXLV.

surety for producing, if he does not produce."(1) The meaning is that, if the debtors fail to discharge the debts, the surety for payment should pay it; the surety for honesty if honesty be disproved, and the surety for production if he fails to produce shall pay the debt. This text, though not quoted by Lakshmidhara and others, is here quoted, because it is found cited in Halayudha's compilation.

Katyayana: "If the surety for production does not produce at the stipulated time and place, he shall, if he was not prevented from doing so by any act of the king or god, pay what he has promised. If the surety does not produce the person when the stipulated time had arrived, he shall be made to pay the agreed sum; this rule applies even where he is dead."(2) The meaning is this: If the surety for production fails to produce (the debtor) at the time when and the place where he had agreed to produce him, he should pay to the creditor the sum due according to the document, provided he did so through any other cause than any obstacle of the king or god. Even in case of any obstacle caused by the king or god, he should pay the sum if he fails to produce after the removal of the obstacle. Even if the debtor be dead, the surety for production should pay the money.

Accordingly: "If the surety fails, in however small a degree in the matter of time and place appointed for the ceremony, he shall be compelled to pay that sum as if proved; this rule applies where the debt had been proved."(3) *Kriyākāre*] fixed for ordeal or ceremony. If the surety for taking oaths transgresses these in even so small a degree, then the ordeal should not be performed. The surety shall be made to pay the sum, as the sum becomes proved to be payable by the surety. The meaning is that the same rule or mode should be known to apply where the debt had been proved.

Accordingly: "From a malicious person, who may be disposed by ill-will to seek the protection of another, to do what may be unpleasant to him, to associate himself with wicked men, let a surety (for honesty) be received, for fear lest he break his promise. If the conduct (of the debtor) be questioned, the surety shall be made to pay."(4) [Protection of another] protection of an enemy.

(1) Narada, I 118 and 119.
(2) I. Cole. Dig., 170, CXLVI.
(3) I. Cole. Dig., 173, CL.
(4) *Ibid*, 171, CXLIX.

Abhavyam) unpleasant. [Association with wicked men] with thieves, etc. That malicious person who is capable of doing all these. The meaning of the former portion is that for fear (that he may break his word) let a surety be taken for confidence. The meaning of the latter portion is that where the good behaviour of the debtor becomes doubtful, then also should a surety be taken. Indeed, it means that, wherever there is any doubt, the king should cause a surety for confidence to be given.

Manu: "If the surety for payment dies, let his heirs be made to pay."(1) "The surety for payment" means "the surety who says 'I will give.'" In his default, his heirs, *i.e.,* sons, shall be made to pay, according to the text "in their absence, their sons."

Katyayana: "Where one becomes a surety for appearance having obtained a hypothecation from the debtor, the son of such surety shall be compelled by the creditor to pay the debt."(2) The meaning is that where one becomes a surety for appearance having obtained a hypothecation from him, his son should, if he is dead, be made to pay the debt to the creditor.

Manu: "When the surety for other purposes than for payment dies, his affairs being known, how is the creditor, if he is so disposed, to realise the debt? If the surety had been given sufficient money by the debtor, the son of the surety who so received the money shall pay the debt out of his own property; this is a fixed law."(3) *Adátari*] sureties other than the surety for payment. His affairs being known] the circumstances of his having received a pledge. How then if such surety die, can the creditor entertain a wish afterwards to realise it? This is the question; and the answer is stated by 'He who has been given money, etc.' *Niradishtam*) paid by the debtor to the surety. The meaning is that if he dies possessed of sufficient wealth, the son of the surety who had so received the money shall pay the debt out of his own wealth. The term 'paid money by the debtor' used of the son is illustrative. In the compilation of Halayudha (the author) after explaining the term 'whose affairs have been known' by 'the circumstance of whose becoming a surety without having taken a pledge is known' and states that the first verse is intended to bear a negative answer, *viz.*, that such surety (*i.e.,* one who had not taken a

(1) Manu, VIII, 160.
(2) I. Cole. Dig., 174, CLIII.
(3) Manu, VIII, 161.

pledge) being dead, the creditor can by no means receive the debt, in answer to the question "how can the creditor recover the debt?" In effect there is no difference.

Vyasa: "The grandson shall pay the debt of his paternal grandsire; the son only shall pay the debt contracted by the father for becoming a surety; (both of these shall pay) without interest; their sons shall not be compelled to pay; this is settled."(1) *Samam*] without interest. All the debts of the paternal grandfather shall be paid by the grandson without interest; the debt contracted by the father for becoming a surety should be paid by the son without interest. The meaning is that their sons, *i.e.*, the great-grandson and grandson need not pay.

Katyayana: "Debts incurred (by the paternal grandfather) for becoming surety, should never be paid by the grandsons; all (such) debt incurred by the father should be paid by the sons without interest."(2) The meaning is that debt incurred by the father on account of becoming surety should be paid by the son without interest, and never by the grandson.

Yájnavalkya: "If the sureties are many in number, they shall pay the debt according to their shares; but if they are bound severally, the payment must be made by any one of them, as the creditor pleases."(3) When one surety is like another, *i.e.*, independent in respect of his affairs, every one of the sureties shall be made to pay the whole debt to the creditor.

Brihaspati: "The creditor should allow time for the surety to search for (the debtor) who is missing; a fortnight, a month or a month and a half, according to (the distance, etc., of) the place (where the debtor is supposed to be hiding himself); the sureties should not be excessively harassed; they should be made to pay the debt gradually; in (the debtor's) presence, they should not be harassed; this is the law regarding sureties."(4) Who is missing] the debtor who had fled away. The meaning is that 'in his presence,' *i.e.*, if the debtor is near at hand or willing to discharge the debt, the surety for production or for payment of the debt should not be troubled.

(1) I. Cole. Dig., 178, CLVII. (2) I. Cole. Dig., 178, CLVIII.
(3) Yájnavalkya, II, 55. (4) Brihaspati, XI, 42 and 43.

Accordingly, "If a surety, when harassed, pay the debt for which he stood surety, he shall get twice that amount (from the debtor) after a month and a half."(1) 'Surety' who has been made a surety.

Vishnu and Narada: "What sum of money the surety pays when being hard pressed by the creditor, the debtor shall pay the surety twice the amount."[2]

Yajnavalkya: "Whatever money the surety is made to pay to the creditors publicly, twice that amount should be given by the debtors (to the surety)."[3].

Katyayana: "That surety, who when being pressed (by the creditor) according to law, pays a certain sum of money shall get back that amount, after proving it by witnesses."[4] By saying "what was paid by the surety, let him take," the paying of it without interest is to be understood. This too shall apply only (when it is paid) before a month and a half. The payment of double the sum ordained by Yajnavalkya and others if it be made after the expiration of a month and a half is not inconsistent. But Grihesvara Misra quotes this text in support of the statement that the surety is entitled to recover from the debtor what the former has paid to the creditor to conciliate him. But this payment of money by the surety in order to be recoverable from the debtor must have been made by him after information given and on the advice of a middleman.

Accordingly, Brihaspati says: "If ignorant persons from their good nature pay debts unasked, how could they obtain the money so given from others."(5) Unasked by a middleman.

Here ends the Chapter of the Vivadaratnakara on Sureties.

S. SITARAMA SASTRI.

THE NEW RULES FOR THE MADRAS COURT OF SMALL CAUSES FRAMED BY THE HIGH COURT UNDER ACT I OF 1895.

The Act No. I of 1895, which empowered the High Court to frame rules for the regulation of the procedure and practice in the Presidency

(1) *Ibid* XI, 44.

(2) Not found.

(3) Yajnavalkya, II, 56.

(4) I. Cole. Dig. 181, CLXIV.

(5) Not found.

Court of Small Causes, received the assent of the Governor-General so long ago as the 4th January 1895, and, though there has thus been a delay of nearly three years and a half on the part of the High Court in exercising that power, the new rules bear evident marks of haste and want of care and seem to have been issued without due consultation with those whose special knowledge of the practice and working of this Court would have enabled them to make useful suggestions in their framing. At the same time, it must be observed, they contain some changes and new provisions which are of a beneficent character and admirably suited to the Court in question. The form in which the rules have been issued is very inconvenient. To have merely noted the numbers of the chapters or sections of the Civil Procedure Code applicable, except where alterations have been made, or new matter has been added, would have been less cumbersome and made the task lighter for the practitioner, as well as the Judge, who have to apply these rules. Some of the definitions in Rule 1 seem to have been transcribed from the Civil Procedure Code without any consideration whether they are of any use for the purpose in hand. For instance, the definition of a Court subordinate to the High Court and the District Court and the elaborate definition of an order having the force of a decree possess merely an academical interest so far as these rules are concerned. In many places, in transcribing from the Code of Civil Procedure, even the necessary verbal alterations have not been made. A Subordinate Court, for instance, is defined "for the purposes of *this Code.*" Another amusing instance is the definition of Government in any part of British India in which the Civil Procedure Code operates, without stating what it means under these rules. Other instances of such careless transcription abound throughout the rules, but we shall content ourselves with pointing out only a few. (*Vide* Rules 21, 296, 391 and 399.) Again, Rule 298 provides how the plaint of a corporation or company may be subscribed and *verified*, although under Rule 34 and the other rules no plaint is required to be verified. Again, Rule 396 states that the provisions thereinbefore contained as to the stating of a case by a Judge shall be applicable to the stating of a case by the Registrar, whereas there are no provisions in the rules relating to the stating of a case by a Judge, S. 617 of the Civil Procedure Code not being reproduced here. The insertion of the usual provision that any appointments, etc., made under any old law shall be deemed to have been made under the corresponding provisions of these rules would have been very useful. For example, the Head Clerk of the Court was empowered under S. 197, Civil Procedure Code, to swear affidavits. That section being now superseded, it is now held that the Head Clerk

has no such power, notwithstanding the reproduction of that section in Rule 138, with the result that parties have to go to the Registrar to swear affidavits—a proceeding which entails much delay and inconvenience. Rule 5 begins: "No Court shall try, etc.," while Rule 6 says: "No foreign judgment shall operate as a bar to a suit *in British India*," while admittedly these rules do not and cannot bind Courts other than that for which they are made. The definition of recognized agents in S. 37 of the Civil Procedure Code, with the exception of cl. (*b*), though applicable to the Small Cause Court under the second schedule to Act XV of 1882, was, by a subsequent notification of the Court with the sanction of the Local Government, declared not to be so applicable. Rule 20 makes that definition again applicable with two important variations. Not only persons resident outside the jurisdiction, but also persons residing within the jurisdiction, may appoint such agents, although the marginal note retains the words "out of jurisdiction," evidently taken from the Civil Procedure Code without the necessary alteration, as the words of the rule itself must be held to override the marginal note. Such agents, again, may be appointed not only by general but also by special powers-of-attorney. Rule 33 reproduces the provisions of the Code as to the contents of a plaint. These provisions, though originally applicable to the Court under the second schedule to Act XV of 1882, were found unsuitable in practice and abrogated by a notification under S. 23 of that Act. We think it would be quite sufficient if the plaint stated merely, as hitherto, the parties, the cause of action, and when and where it arose. By Rule 34, it is only when the plaintiff is, owing to absence, or other sufficient cause, unable to sign the plaint, that it may be signed by any person duly authorized by him in this behalf. Such authorization should be in writing and presented with the plaint. No verification is necessary, not even in the case of plaints, under Ch. XXXVI of these rules (Ch. XXXIX of the Civil Procedure Code) which had to be verified under the old rules. Rule 104 requires the defendant, if he contests the plaintiff's claim, to state his plea or pleas at the first hearing, and by Rule 109, in such a case, the Court may, if it thinks fit, frame issues and adjourn the case for final hearing. It is to be hoped that this latter provision will henceforth be largely and judiciously availed of, as it is a great hardship to the plaintiff to require him to disprove a case which he knows nothing about, and in many cases contested suits, though adjourned to be taken up later on in the course of the day of first hearing, are not, nor can be, as a matter of fact, taken up on that day. In the rules relating to the examination of witnesses, it might usefully have been provided that judges may take such notes of the evidence of witnesses as they think fit, so as to make such notes admissible in evidenc

in subsequent proceedings for giving false evidence etc., without the necessity of calling the judges themselves as witnesses. It is to be hoped that the High Court will soon exercise its power under cl. (c) of Rule 137 of appointing one or more persons in the Small Cause Court to swear affidavits. We note in the rules the absence of all provision for the transmission of decrees and the execution of transmitted decrees. S. 31 of Act XV of 1882 provides, no doubt, for the transmission of decrees of the Small Cause Court to other Courts and their execution by them, and S. 223 of the Civil Procedure Code provides in certain cases for the transmission to the Presidency Small Cause Court of decrees of other Courts, and S. 225 for the execution of decrees so transmitted. [See also S. 8, Civil Procedure Code]. We take it that the applicability of these and similar sections is not affected by the rules, although they are issued in "supersession of the law and rules now in force with respect to the procedure or practice of the Small Cause Court." * Similarly S. 648 of the Civil Procedure Code provides for the execution by the Small Cause Court of interlocutory orders of arrest and attachment passed by other Courts. But we fail to see why Ss. 229, 229-A and 229-B of the Civil Procedure Code, which were formerly applicable to the Small Cause Court under the second schedule to Act XV of 1882, have not been reproduced The time beyond which it is necessary to take out notice of execution of decree is extended from one to two years. Warrants are to be made returnable within two months. These are very useful changes, and another important and beneficent provision is made in Rule 190, whereby a garnishee can, in execution proceedings, be required to show cause why he should not pay the debt, etc., into Court; and if he shews no such cause, execution may be ordered to issue against him, and if he seeks to show such cause, the claim may be tried as a regular suit. The only part of this provision, of which we do not approve, is that which gives the Court power to assume at its discretion jurisdiction over claims which it could not adjudicate upon in regular suits. An attachment of movable property by seizure shall not, under Rule 208, remain in force for more than three months; after which time it

* We arrive at this conclusion for the following among other reasons. When an Act makes certain provisions and gives power to another body to make rules, such rules should, unless the contrary is clearly denoted, be made subject to those provisions. If the Legislature had intended that the rules should supersede these sections, it would have repealed them. as it has repealed Ss. 9 and 23 of Act XV of 1882. Again, it is doubtful if S. 223 and the similar sections of the Civil Procedure Code can be said to provide for the practice or procedure in the Small Cause Court within the meaning of Act I of 1895 and the rules: they rather provide for the carrying out of decrees and orders of other Courts through the instrumentality of that Court.

shall be returned to the judgment-debtor on his application. Failing such application within three months, it may be sold and the proceeds retained in deposit, for whom it does not appear. We fail to see why the limit of twelve years for the execution of a decree for money prescribed by S. 230 of the Civil Procedure Code and the power to issue a temporary injunction are not extended to the Small Cause Court, although they are extended to Provincial Small Cause Courts. S. 617 of the Civil Procedure Code which gave power to the Court to make a reference to the High Court at discretion and which was applicable under the second schedule to Act XV of 1882 is not reproduced in these rules. Nor is the provision for the exemption from arrest under civil process of judges, pleaders, parties and witnesses, while going to and returning from Court. Whether these omissions have been made intentionally, and if so, for what reason, we cannot understand.

Besides these, we note a very grave omission—the absence of all rules relating to new trials and the constitution of benches of two or more judges to hear the same. The previous rules on the subject are, we apprehend, abrogated, as the new rules are issued in "supersession of the law and rules now in force with respect to practice or procedure" in that Court. S. 9 of Act XV of 1882, as amended by Act I of 1895, expressly declares that rules made under that section may provide for the exercise by one or more of the Judges of any powers conferred on the Court by that or any other enactment. It may be doubted, under these circumstances, whether two or more judges can validly sit for any purpose, and whether applications for new trials would not lie on grounds other than that of error in law.

We also note another defect for which not the rules but the Legislature itself is responsible, *viz.*, the repeal of the second schedule to Act XV of 1882, which declared what sections of the Civil Procedure Code were applicable to the Small Cause Court and the bestowal of power on the High Court to make rules for 'the practice and procedure' merely in that Court. The effect of this is to place the Small Cause Court in an anomalous position. The Civil Procedure Code treats of many mutual relations of the Courts to one another; but, as the Small Cause Court is not within the pale of that Code, and as the rules made by the High Court can bind only the Small Cause Court, such mutual relations cannot be provided for. To make our meaning clear by examples. Rule 399 empowers the Small Cause Court to send its interlocutory orders of attachment and arrest to other Courts for execution, But no power is, or can be, conferred by the rules on those Courts to execute such orders, similar to the power given in S. 648, Civil Procedure Code. Similarly

with respect to the execution by other Courts of commissions issued to them by the Small Cause Court, notwithstanding that Rule 268 in this case provides that the Court receiving the commission shall examine the witness pursuant thereto. Again, it may be doubted whether the High Court has any power of revision under S. 622 of the Civil Procedure Code over the Small Cause Court, as that section has by the repeal of the second schedule to Act XV of 1882, ceased to be applicable to that Court.

X. Y. Z.

NOTES OF INDIAN CASES.

Marudamuthu Nadan *v.* **Srinivasa Pillai,** I. L. R., 21 M., 128. The decision of the Full Bench in this case, would, it appears to us, be accepted as sound law throughout India, although some decisions could be quoted in Bengal to the contrary. If acceleration of the reversioner's estate is the result of the surrender of the widow's interest, it can only happen on the footing of the widow-stepping out leaving the inheritance to take its course. A surrender of each item of property would only amount to a surrender of life-interest, the reversionary interest being ascertainable upon her death. It is only the surrender of the whole estate that can have the effect of a natural or civil death. It would be absurd to suppose as many civil deaths as there are surrenders of property by her.

Pichuvayyan *v.* **Vilakkudiyan Asari,** I. L. R., 21 M., 134. The learned Judges observe that a mortgagee of service inam land, inalienable under Regulation VI of 1831 can sue for it only in the Revenue Courts. Supposing a person was in adverse possession of such land against the office-holder, it would seem to us, he would be entitled to retain possession after the lapse of the statutory period. He would not have to sue for it in the Revenue Courts after his title has become complete. S. 3 of the Regulation appears to us to refer to claims to the land based upon the right to the office. There would, therefore, be no reason why a person claiming a mortgage right by adverse possession should not establish it in the Regular Courts.

Viru Mamma *v.* **Krishnan,** I. L. R., 21 M., 141. Madras Act I of 1887 (Malabar Tenants' Improvements Act) has given rise to much difficulty of interpretation; and several judges have confessed themselves unable to understand the Act. The Act was intended as a remedial measure and compensation for improvements in all cases coming after the Act was intended to be granted according to its provisions. The

language of S. 7 as pointed out by the learned Judges does not deal with contracts entered into prior to the Act as regards improvements effected before the Act. It would also appear to us that even after the Act has come into force where agreements are entered into as to the value of improvements effected prior to the agreement, they cannot be overridden by the provisions of the Act. We are, aware, that this view of ours is in conflict with the opinion of *Subrahmania Aiyar* and *Davies*, J. J., in *Eressa Menon* v. *Shamu Patter*, I. L. R., 21 M., 138. But we think sufficient attention was not given to the language of the section.

Rego *v.* **Abu Beari**, I. L. R., 21 M., 151. We think there is something wrong in the report of this case. The reporter's statement of the facts seems to be erroneous. Upon his statement of the facts we do not see how any question as regards the application of Art. 134 arises. He says, that a person mortgages property and afterwards sells it to the mortgagee. The plaintiff who is the subsequent vendee from the mortgagor sues to redeem. It may be that the plaintiff's sale was bad if the sale to the mortgagee was good. But we cannot see how any question of limitation arises.

Ittappan *v.* **Manavikrama**, I. L. R., 21 M., 153. The case raises very interesting questions and was argued most elaborately before two of the ablest Judges of the Madras High Court. But it must be confessed that the judgment is somewhat disappointing. One question was, as to the application of S. 43, C. P. C. Two persons are tenants in common of numerous items of properties. One of them sues the other for partition of one or two items and obtains a decree. He now sues for the partition of the whole of the remaining items. The defendant pleads the bar of S. 43. It is agreed that if the cause of action in the subsequent suit were different, S. 43 would be no bar. *Shephard*, J., argues :— suppose the previous suit had been dismissed on the ground that partition of all the items should have been asked for; would not a subsequent suit for partition of the whole be maintainable? and therefore, he asks, why should it make any difference that the prior suit was decreed. But we think there is a difference. Where the former suit is dismissed upon the preliminary ground that a suit for partition of the whole should have been brought, it is a refusal by the Court to adjudicate upon the cause of the action and such refusal cannot debar the plaintiff from making the whole claim upon his cause of action in a subsequent suit. That is not a separate action for partition of each item of property. But where the prior suit is decreed, it is an adjudication upon the cause of action and a subsequent suit would fall within the scope of S. 43. *Subrahmania Aiyar*, J., argues that because the plaintiff in the former

suit alleged a right to have a partition of one item only and in the subsequent suit alleges a cause of action for the partition of all the items they are distinct causes of action. But the question whether the causes of action are one and the same does not depend upon how the plaintiff chooses to describe the cause of action in the first suit, but what is in substance the real cause of action. The reasoning of the learned Judges does not, therefore, commend itself to us. But it is possible to support the conclusion arrived at by a different course of reasoning. The right to partition is an incident of tenancy in common. There is no breach or violation on the part of the defendant required to give the plaintiff a right to sue. As the right to divide accrues every moment the tenancy continues, there seems to be a fresh cause of action upon the basis of the continuing tenancy after the termination of the first suit. If we are right in this view, the conclusion would be unexceptionable.

As regards the other question of limitation also the judgments do not appear to us to be altogether satisfactory

Seshadri Aiyanar *v.* Nataraja Aiyar, I. L. R., 21 M., 179. This decision is only a further illustration of the hopeless state to which matters have drifted under Act XX of 1863. An important question is raised as to the powers of the committee over the trustees subject to them under the Act. It is said they have power to dismiss for good cause; the question is raised have they the power to suspend the trustee pending enquiry into charges against them? This power is denied by *Shephard*, J., and apparently also by the *Chief Justice*, while *Davies*, J., strenuously affirms it. Suspension, of course, is not different from dismissal, and if a good cause were necessary to justify the one, it would seem to be necessary to justify the other.

That the committee should possess large disciplinary powers as claimed by *Davies*, J., for their suspension pending enquiry would be reasonable. It is impossible to express any opinion upon questions of this description where the Act throws no light. It is highly regrettable that the Legislature should sullenly decline to further any measure of legislation which will set matters right. This is only one of the numerous instances in which the Act has practically become unworkable.

Ramasamayyan *v.* Veeraswami Ayyar, I. L. R., 21 M. 222 Here again the reporter has failed to catch the point in the decision. Under a query, he notes whether *Bhawani Prasad* v. *Kallu* I. L. R., 17 A., 537 lays down the right rule with reference to S. 85 of the Transfer of Property Act. We understand, however, *Shephard*, J., to disapprove of it, and *Davies*, J., to say that he cannot say he disagrees with it.

The question, however, does not appear to us to involve any difficulty and the dissenting judgment of *Banerji*, J., in *Bhawani Prasad* v. *Kallu*, I. L. R., 17 A., 537, appears to us to put the matter right. The point is where a decree is obtained upon a mortgage against a Hindu father and property sold, whether the sons who were not made parties to the mortgage suit can contend that the sale did not affect their interest. The authority of the decisions of the Privy Council is clear that the sale passes the son's interest also. But has S. 85 made any difference? We think not. *Turner*, C. J., thought so in the case in *Ponnappa Pillai* v. *Pappuvayyangar*, I. L. R., 9 M., 343. That section would justify the dismissal of the suit if the sons were not made parties. But if a decree has been passed, S. 85 cannot affect the validity of the sale held in pursuance of it any more than a sale held in pursuance of a money-decree. Unless the decree was itself a nullity against the father also, which is absurd, the consequence of the sale is to pass the son's property also.

Sanjivi *v.* Jalajakshi, I. L. R., 21 M., 229. We are glad to note the decision of *Subrahmania Aiyar* and *Benson*, J. J., in this case. Judicial opinion has been rather slowly drifting towards the conclusion arrived at in this case and the Judges have at last pronounced that the adoption of a dancing girl which every body in this country knows to be for the purpose of prostitution is invalid. It is absurd to talk of the adoption of a girl by a woman and more so of the plurality of such adoptions. At one time the moral sense of the community was said to be in consonance with the recognition of such adoptions, but at last the right standard of morality was found in the penal law. Testamentary power is large now-a-days and even a dancing girl has not got to resort to the device of trading in prostitution to enable her to pass her property to whomsoever she likes.

SUMMARY OF RECENT CASES.

Rango Balaji *v.* Mudiyeppa bin Mallappa.

*Evidence—Presumption as to death of person not heard of for seven years—Presumption as to date of death of person not heard of for seven years—Onus of proof—*Res judicata—*Plaintiff recovering under deed of gift though issue of adoption decided against him, such issue not* res judicata *—Adoption, validity of, depending upon fact of natural son being alive or dead at date of it—Deed of gift or will conferring estate an account of filling certain character, not necessary for such party to prove affirmatively that he fills it, in order to recover estate—Indian Evidence Act, I of 1872, Sections* 107 *and* 108.

Where a suit is based on a title by adoption as well as under a deed, and is decided in favour of the plaintiff on the strength of the deed, the

issue as to adoption being found against him, the decision on the issue does not render the question of the adoption *res judicata* in a subsequent suit as regards other property, between the plaintiff and the representatives of the defendant in the former suit.

A person not having been heard of for seven years, though under Sections 107 and 108 of the Evidence Act, the presumption is that he is dead, there is no presumption as to when he died or that he lived for seven years. If it is necessary to establish the exact date of his death, he, upon whom the *onus* of establishing that date is cast, must establish it or otherwise he must fail. The plaintiff seeking to recover property on the ground of his adoption, the validity of which depend on the fact as to whether his adoptive father's natural son who was missing before the adoption, was alive or dead at the date of it, must prove affirmatively that the natural son was dead at the date of his adoption. If the plaintiff cannot prove that the adoption was valid and the defendant cannot prove that it was invalid, no presumption can be raised for or against the adoption. The question would be one of *onus* of proof.

Where a deed of gift or will confers an estate upon a named person because he fills, or by reason of his filling, a certain character, he is entitled to recover the estate without affirmatively proving that he fills such character, the *onus* of proving that he does not fill the character which is the reason of the gift lies upon those who dispute his claim :—

Printed Judgment of the B. H. C. for 1898.

Solicitor's lien—Third parties—Administration suit—Lien acquired before action.

In re **Hawkes, Ackerman** *v.* **Lockhart** [1898, II, Ch., 1, C. A.]

In this case the question, what is the extent of a solicitor's lien on the records of his client in his possession and how and against whom such lien can be exercised, was very elaborately argued before the Court of Appeal. The Judges composing the Bench that heard the appeal have also given very elaborate judgments fully dealing with the subject. G, a testator, had during his life-time employed one Cridland as his solicitor, and in the course of such employment Cridland came into possession of certain documents belonging to G. At the date of G's death a considerable sum was due to Cridland for costs and money lent. Subsequently, the executors of G employed Cridland to take out administration, and the usual administration judgment was pronounced. But, as the action was not prosecuted with due diligence, the Court handed over the administration to one Pearce, a creditor, the estate being insolvent. The exe-

cutors, however, remained parties on the record and Cridland continued to act as before. In the course of the administration, Pearce wanted to enforce an outstanding mortgage security forming part of the estate and wanted Cridland to produce the necessary documents so as to enable him to prepare a case for counsel. Cridland refused to produce them claiming his usual lien. The Court of Appeal held confirming the decision, of *Kekewich*, J., that, notwithstanding his lien, Cridland was bound to produce the document in question and that he can be compelled to do so summarily by an ordinary summons.

A solicitor's lien is simply a right to retain his client's documents as against the client and persons representing him. As between the solicitor and third parties the solicitor has no greater right to refuse production of documents on which he has a lien than his client would have if he had the documents in his own possession. If the client is bound to produce them for the benefit of a third party, so also must the solicitor, and it is immaterial that the lien had been acquired before the action of the third party was commenced.

Internatonal law—Matrimonial domicile—Domicile at the time of death.

In re **De Nicols, De Nicols** *v.* **Curlier** [1898, II, Ch., 61 C. A.]

A testator and his wife, both French, were married in France. They entered into no express contract on their marriage with respect to their property, present or future. Subsequently, they went to England taking with them a small fortune and there they became permanently domiciled. The husband amassed a large fortune in England and died there in 1897, leaving a will by which he gave a life-estate to his wife in all his property and the remainder to his daughter and her children. On the death of the husband, the wife took out an originating summons to ascertain her rights and interests in the property of the testator. *Kekewich*, J., held that the change of domicile did not alter the legal position of the parties and that her rights were governed by the French Law, the law applicable to the matrimonial domicile. On appeal, however, the Court of Appeal reversed his decision and held following [*Lashley* v. *Hog*, 1804, 4. Pat, 581, House of Lords] that on a change of domicile the rights of husband and wife as to unsettled moveable property also changed, and that as at the time of the husband's death the parties were domiciled in England their rights were governed by the English Law, and that, consequently, the husband's personal estate was effectually disposed of by his will.

House of Lords' Decision—Res judicata.

The London Street Tramways Co., Ld. *v.* The London County Council [1898, A. C., 375].

Under the Tramways' Act of 1870, the London County Council purchased from the Street Tramways Co., Ld., certain portions of their Tramways. The Company claimed to be paid, for their tramway undertaking, its value as a going and profit earning concern and tendered before the referee of the Board, evidence showing that at the time of the notice to sell, there were existing profits of the Company. The referee, however, rejected the evidence and held that the Act did not allow him to adopt a method of valuation based upon profits. The Company then applied to the Queen's Bench Division to set aside the award; but the application was referred, and this decision was confirmed by the Court of Appeal. The Company then brought the present appeal before the House

There were previous decisions of the House upon the same point in this appeal, and the question arose as to the power of the House to re-consider its own decisions and if it thought them wrong to overrule or depart from them in subsequent cases.

The Lord Chancellor in delivering the judgment said, that "the decision once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was *res integra* and could be re-argued and that so the House be asked to re-consider its own decision." An erroneous decision of the House, can therefore be set right only by an Act of Parliament.

We have carefully gone through the arguments of the Counsel and the judgment of the House, but we find no valid reason whatever stated for the enunciation of this anomalous proposition. The only reason given is "*stare decisis*," *i.e.*, that the House has on a number of occasions acted upon this rule of Law. But with profound respect to the learned Lords, we humbly submit that the doctrine of "*stare decisis*" has been unduly extended. The application of that doctrine ought to be limited to those decisions alone which declare laws directly defining the rights and liabilities of subjects. It ought not to be extended to decisions which define the declaratory power of the Court itself, *i.e.*, its own jurisdiction. In the course of the argument the learned Counsel for the respondents suggested a case where this rule may lead to a glaringly absurd result *e.g.*, where the House omitted to notice an Act of Parliament. The Lord Chancellor gets over this by saying that the finding out of the existence of an Act of Parliament is a question of fact

and not of law and therefore, can be re-argued. We humbly submit that the answer given is not satisfactory. In enunciating a rule of law whether it is found in the Statute Book or in the Decisions or is *unwritten*, the House of Lords and all the Subordinate Judiciary perform the same function, *i e.*, that of finding at what the *law is.* The argument that the finding out of an Act of Parliament is a question of fact will, therefore, apply to the other cases also where the Court has to declare rules of law for which evidence other than the Statute Book has to be relied on. Accordingly their Lordships dismissed the appeal as the case was governed by previous decisions whether right or wrong and refused to re-consider those decisions.

Construction of Statutes—Retrospective effect.

Young v. Adams [1898, A. C., 469].

The rule of construction, that no retrospective effect ought to be given to a statute unless an intention to that effect is expressed in the statute itself in plain and unambiguous language, had a signal application in this case. The respondent entered the service of the Government of New South Wales in the year 1885, as a road surveyor at a yearly salary. He continued in that employment till 1895, when he was summarily dismissed without compensation. In 1896, he sued the appellant for damages for wrongful dismissal. Five months after his dismissal, the New South Wales Act (59 Vic., Ch. 25, p. 58) had been passed and S. 58 of the Act enacted that "nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it had existed before the passing of the said Civil Service Act, to dispense with the services of any person employed in the public service." The appellant (Government) maintained that by virtue of this section they were entitled to dismiss any public servant at their pleasure as they had a right to do before the Civil Service Act of 1884. The Civil Service Act of 1884, had provided that the Government had no power to dismiss its servants except upon the grounds and after the inquiry which the Statute prescribed.

The Privy Council affirming the decision of the Court below awarding damages to the respondent held that the respondent who had been dismissed from the public service before the Act of 1895 came into force, but not in the manner prescribed by the Act of 1884, was not affected by the provisions of the later Act, which only applied to persons actually employed in the service at and after the date thereof. They accordingly overruled the contention of the Government.

Joint-debtors—Effect of judgment against one as regards the other.

McLeod v. Power [1898 II, Ch., 295].

The plaintiff sued defendants J. P. and H. P. for "2,000*l.* and delivery of 24,500 shares in the South African Saltpetre Fields, Limited, or their nominal value in cash, and 100*l.* damages for their detention or in the alternative . . . . . specific performance " of two agreements between the defendants and plaintiff. Both the defendants entered appearance and put in their written statements. Subsequently, however, H. P. admitted his liability in the action and consented to judgment being entered against him in full. In these circumstances, it was held by *Byrne*, J., that the suit should be dismissed as against the other defendant. His Lordship however disallowed J. P.'s costs on the ground that he had not specially pleaded the consent judgment as a defence to the suit immediately after the passing of that judgment

This is a curious and we believe the first application of the rule in *King* v. *Hoare* (1844, 13 M. N. W., p. 494) that a judgment against one of 2 joint-debtors is a bar to proceedings against another. *Byrne*, J., held that regard being had to the reason of the rule, it should be applied to cases like the present where both the joint-debtors are parties to the same action.

JOTTINGS AND CUTTINGS.

We beg to acknowledge with thanks the receipt of the following publications :—

A Treatise on Aliya Santana Law and Usage by Gangoolly Krishna Rao, B.A. LL.B., Printed at *the Codialbail Press, Mangalore* :—Price Rs. 2-8-0.

The Albany Law Journal for August (*in exchange*).

The Calcutta Weekly Notes for August (*in exchange*).

The Allahabad Weekly Notes for August (*in exchange*).

The Green Bag for August (*in exchange*).

The Canadian Law Times for July (*in exchange*).

The Canada Law Journal for July (*in exchange*).

The Educational Review for August (*in exchange*).

The Bench and the Bar in Madras:—It is always a painful thing to have to notice any want of harmony in the relations between the Bench and the Bar and especially so if that occurs in the highest Court of the land. The local dailies have published accounts of some discreditable scenes in the Court over which Mr. Justice *Davies* has been presiding as the senior Judge. The language that the Judge has permitted himself to use detracts considerably from the dignity of the Bench, even supposing that the individuals who appeared before him merited the censure. But we must confess that, barring a certain amount of inaccuracy of speech, we could see nothing in the conduct of the practitioners concerned which could afford any justification for the very intemperate language employed by the Judge. Mr. Justice *Davies* has been generally credited with a great anxiety to do justice in every case that comes before him, but we do not know how he reconciles it with the violence of language which practically prevents the practitioner concerned from placing before the courts the facts and arguments which tell in favour of his client. The matter is likely to be looked at from a personal point of view, but we think there is a more serious aspect which ought not to be lost sight of. Language such as that which Mr. Justice *Davies* has thought proper to make use of is likely to interfere seriously with that free and fearless discharge of duty which is alike the glory of the profession and the safe-guard of the suitor's rights. A counsel walking into the court-house with an aching heart and a feeling of alarm in expectation of the presiding Judge coming down upon him at any moment is not likely to present the case of his client in the best possible light. And the whole theory upon which rests the English system of administering justice according to which the criminal in the dock upon a capital charge and the penniless claimant for an estate are afforded the privilege of legal assistance for the most favorable presentation of their case receives a rude shock when conduct such as that we have animadverted upon becomes the daily experience of professional men. For the sake of the dignity of the Bench and for the freedom of the Bar, and we may add, for the sake of justice, we hope there will be no recurrence of scenes like those which the local dailies have chronicled.

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Is Jaimini's Mimamsa an authority? In a case recently argued before the Privy Council, the question was the validity of the adoption of an only son. In the course of the argument, one of the Lords of the Judicial Committee appears to have put the question, whether Jaimini's Mimamsa had ever been followed as an authority. The question was, of

course, natural to a lawyer familiar only with the translations of the Hindu law books. Nor would the question appear surprising to most of the English Judges in India. But any person acquainted with the Sanskrit writers is likely to marvel at the question. The aphorisms of Jaimini's *Purva-Mimamsa* are the rules of interpretation, according to which every Sanskrit writer endeavours to construe the texts of the sages and are of the highest authority, as being the guides of every Commentator. It is, however, quite another thing to arrive at one's own interpretation of the texts in the light of the rules of the Mimamsa where Commentators of authority have placed a particular interpretation, professing to guide themselves by the same rules of the Mimamsa.

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Power of appointing District Munsifs. We would draw the attention of the High Court to the provisions of the Madras Civil Courts Act with regard to the appointments of District Munsifs and the control exercised over them. S. 7 of the Civil Courts Act empowers the High Court to appoint District Munsifs; and the High Court means all the Judges of the High Court, and not any one Judge possessing delegated authority. The power conferred under the Letters Patent, S. 36 and S. 13 of the Charter Act of exercising the original and appellate jurisdiction by Benches of one or more judges constituted by the Chief Justice has nothing to do with the appointments which the High Court is empowered to make by the Civil Courts Act or the superintendence exercised under it. Unless such appointments are made or such powers exercised by the whole High Court, they would seem to be of no legal validity.

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Patronage and Power of Superintendence exercised by the High Court:— Considerable dissatisfaction seems to be felt in the subordinate ranks of the judicial service at the way in which the High Court exercises its patronage and its powers of superintendence. There has been a practice of assigning this kind of work to a particular Judge, generally the senior civilian Judge. It would appear to be against the provisions of the law. That it is very undesirable will be accepted in case the individual entrusted with the duty happens to have strong idiosyncracies or is not particularly keen-sighted. The subordinate judicial service is entitled to the opinion of all the Judges for the time being of the High Court instead of being subject to the tender mercies of any one individual who being himself unequal to the careful discharge of his duties in that respect may rely too much upon subordinates without any high principles.

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Judge's Notes of Evidence:—We would draw the attention of *Sir Arthur Collins* and of *Mr. Justice Boddam* who are sometimes in the habit of speaking of Judge's notes as the property of the Judges of which parties are not entitled to copies to the following remarks of *Lindley*, M.R., in a case before the Court of Appeal which we take from the London Weekly Notes for 1898, No. 32, p. 77.

"It is desirable that Solicitors should know that, on an appeal in cases where evidence has been taken orally in the Court below, it is their duty to apply in good time for the Judge's Notes of Evidence. If they do so, they will generally be supplied by the Judge's clerk with copies of those notes; whereas if they apply, as is frequently done, just before the appeal is heard, there is no time to furnish such copies. The notes themselves are often difficult to read."

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Mr. Justice Boddam:—We would venture to make a suggestion to his Lordship Mr. Justice Boddam if his Lordship would deign to take it from us. It is said that Lord Mansfield advised a newly-appointed Colonial Judge never to give reasons for his decisions. This advice seems evidently to command the approval of his Lordship *Mr. Justice Boddam*, for we find his judgments, whether on the Original Side or on the Appellate Side, characterised by great brevity, especially on questions of law. Brevity has been said by high authority to be the soul of wit, but it may be carried to a point where the wit may be far from apparent. On the Original Side, his Lordship seldom records written judgments, unless we are to take his notes of the findings on the issues as judgments. We do not suggest that his Lordship should personally take the trouble of writing the judgments, but we can conceive no reason why he should not have his judgments taken in short hand by the stenographer of the Court. The practice of the learned judge is fraught with great disadvantage to suitors who may wish to appeal against his judgments and even more to those who may desire to support his judgments upon appeal. It is also a disadvantage to the Judges of the appellate court that they should be obliged to decide appeals without any knowledge of the reasons which have influenced the learned Judge in his decisions. Another feature of his Lordship's judgments is the absence of any indication of any examination of the authorities bearing upon questions of law. As member of the highest Court in the Presidency, as a member of a tribunal whose judgments should furnish a guide and a model to the numerous subordinate courts in the country, his Lordship is expected by the public and by the

profession to deliver judgments which shall be as learned as sound. *Mr. Justice Jenkins* has been in Calcutta for about the same time as *Mr. Justice Boddam*, but the former has already won a reputation for ability and learning as one of the ablest Judges of the Calcutta High Court. Judicial reputations have never been won whether in India or in England, by mere laconic statements of the net results of decisions. In justice to himself, in justice to the litigant public and the profession, and in justice to the interests of law, we hope his Lordship will not merely go deep into the learning of the various questions of law that come before him, but will also take pains to see that his judgments bear the clear and unmistakable impress of careful research and sound consideration.

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Notes of American cases.

Signing an instrument in which the amount is written in pencil and leaving it with an agent for delivery is held, in *Walsh* v. *Hunt*, (Cal.) 390 L. R. A. 697, not to constitute such negligence as will render the maker liable to an innocent holder for the agent's forgery by raising the amount.

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A carrier that unloads goods during a storm on an open platform and leaves them unprotected from the weather because there is no building or agent at that place and the bill of lading provides for delivery on the platform at the risk of the owner is held, in *Allam* v. *Pennsylvania R. Co.* (Pa.) 39, L. R. A. 535, to be free from liability for injury to the goods, and such a contract is held not to be against public policy.

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Damages for mental anguish, independent of and unaccompanied by physical injury of any kind, are denied in *Peay* v. *Western Union Teleg. Co.* (Ark.) 39, L. R. A. 463.

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The fact that a wire charged with a dangerous current of electricity fell and caused injury is held, in *Snyder* v. *Wheeling Electrical Co.* (W. Va.) 90 L. R. A. 499, to make a *primâ facie* presumption of negligence, but not a conclusive one, as the misfortune may have occurred from inevitable accident.

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The mere naked assertion of the value of property by the vender to the purchaser during negotiation for a sale, though consciously untrue

and relied upon by the purchaser to his hurt, is held, in *Gustafson* v. *Rustemeyer* (Conn.) 39, L. R. A. 644, insufficient to constitute an actionable deceit.

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Under a power given to a wife to appoint another trustee instead of the one named in a trust deed executed by her husband for the benefit of the wife and her children, it is held, in *Stearns* v. *Fraleigh* (Fla.) 39, L. R. A. 705, that she may appoint the husband himself, if the former trustee resigns.

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Insurance on wearing apparel, jewelry, etc., contained in a specified building is held, in *British America Assurance Co.* v. *Miller* (Tex.) 39, L. R. A. 545, not to cover the property at another place where the family was temporarily staying, although they went there periodically, as the agent knew.

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To publish that a debtor pleaded the statute of limitation, and to say that this is dishonest, is held, in *Hollenbeck* v. *Hall* (Iowa) 39, L. R. A. 734, insufficient to constitute a libel.

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The immaturity of a debt at the time of the debtor's death is held, in *Ainsworth* v. *Bank of California* (Cal.) 39, L. R. A. 686, insufficient to prevent its set-off against a claim due to the estate, if it is mature at the commencement of the action.

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A ruling in favor of the claim of proponents of a will, that its formal execution is to be as seemed, is held, in *Re Stetson's Will* (Mas.) 39, L. R. A. 715, insufficient to prevent them from subsequently calling the subscribing witness to testify to its execution. With this case is a note on opinions of subscribing witness as to sanity or insanity.

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Ice not a necessity in the administation of Justice:—It has just been judicially decided that ice is not a necessity in the administration of justice. The Superior Court, in *Commecial Ice Co.* v. *City of Philadelphia*, decided that ice for cooling water in the offices of the register of wills and clerk of the Orphans' Court in Philadelphia is not one of the "things necessary for the proper furnishing of the offices of the register of wills and the rooms of the Orphans' Court," for which, under the Act

of April 25, 1889, P. L. 52, the City of Philadelphia would be liable. "To reverse the action of the Court below," says the Superior Court, "would require us to determine judicially that the providing of ice is necessary for such furnishing. This we are not prepared to do. We construe the language of the act to cover only those things which, if absent, would obstruct or prevent the proper conduct of business of the offices of the register of wills and of the said Courts. While the use of ice may have come to be so prevalent as to make it to many people more than a luxury, we cannot hold that it is *necessary* to a proper furnishing of a public office or Court-room." Good Judges will doubtless disagree on the point herein decided. Circumstances in which the lack of ice would obstruct or prevent the proper conduct of business in the aforesaid Courts can be easily imagined, as, for instance, where an attache has succumbed to the torrid climate of Philadelphia in July. Water being a prime necessity, it would follow that it ought to be furnished in palatable condition. However, the doctors may differ, just as they probably would as to whether sugar is a necessity in the matutinal oatmeal or coffee :—*The Albany Law Journal.*

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A Connecticut Judge is reported to have instructed a jury in the following language: "Gentlemen, you have heard the evidence. The indictment charges the prisoner with stealing a jackass. This offence seems to be becoming a common one. The time has come when it must be stopped; otherwise, gentleman, none of you will be safe." :—*The Albany Law Journal.*

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A prisioner, an old offender, was tried at Ennis on the last day of the Assizes for country Clare, Iriland. He was charged with highway robbery, and was, to the surprise of the bench, acquitted. The chief baron thus intimated to the jury his view of the verdict. "Is there," he inquired, "any other indictment against this *innocent* man?" "No, my Lord," was the reply. "Then tell the gaoler not to let him loose till I get *half an hour's start* of him, for I'd rather not *meet him on the road.*"—*Law Times (London).*

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Lord Russell of Killowen, years before he took silk, was sitting in Court, when another barrister, leaning across the benches during the hearing of a trial for bigamy, whispered: "Russell, what's the extreme

penalty for bigamy?" "Two mothers-in-law," replied Russell, without hesitation. *The Albany Law Journal.*

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A *Royal Warrant*, which was published in the *London Gazette* last Monday, though issued in March, at last gives to the children of all Lords of Appeal precedence immediately after the younger children of hereditary Barons, and the right to use the prefix 'Honourable.' The warrant finishes an interesting chapter in constiutional history. More than forty years ago it was necessary to strengthen the judicial element in the House of Lords, and Lord Cranworth thought that this could be done by the creation of life Peers, a step for which there were some doubtful precedents. Sir James Parke was therefore in 1856 created Baron Wensledale and a Peer for life; but after much discussion the House of Lords resolved, on the recommendation of the Committee of Privileges, that the grant did not enable the grantee to sit and vote in Parliament. The Government made no attempt to oppose the resolution, and a hereditary Peerage was conferred on Lord Wensledale. Here the matter rested until the Appellate Jurisdiction Act, 1876, gave the Crown power to appoint four Lords of Appeal who were entitled to sit and vote in Parliament, but only during the tenure of their office, though they retained the rank of Baron for life. A Royal Warrant gave their wives the title of Baroness, but no title or precedence was given to their children. In 1887, when Lord Blackburn, retired, it was considered desirable that his valuable services, and those of other Law Lords, who might follow his example, should not be entirely lost. The Appellate Jurisdiction Act of that year made them members of the House of Lords for life, thus converting them into life Peers in the true sense of the word.—*The English Law Journal.*

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The *London Gazette* announces that the Queen has been pleased to issue a warrant declaring 'with respect to all the surviving children of the undernamed persons, all of whom either were formerly or are now Lords of Appeal in Ordinary, namely Colin Blackburn, Lord Blackburn, deceased; Edward Strathearn Gordon, Lord Gordon of Drumearn, deceased; John David Fitzgerald, Lord Fitzgerald; deceased; William Watson, Lord Watson; Edward Macnaghten, Lord Macnaghten; Michael Morris, Lord Morris; James Harmen, Lord Harmen, deceased; Charles Synge Christopher Bowen, Lord Bowen, deceased; Charles Russell Lord Russell of Killowen (now Lord Chief Justice of England); and Horace Davey, Lord Davey; as also with respect to the children of any

Lord of Appeal in Ordinary hereafter to be appointed and created a Lord of Parliament for life; that such children shall have and enjoy on all occasions the style and title enjoyed by the children of hereditary Barons of these our realms, together with the rank and precedence next to and immediately after the younger children of all hereditary Barons now created or hereafter to be created, and immediately before all Baronets.'—*The English Law Journal.*

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Circuit by Judges:—It is a mutual advantage for the Judges to know the provinces, and for the provincials to know Her Majesty's Judges. Their presence serves as a useful civic lesson for the provincial public, more accustomed to be left to the tender mercies of Quarter Sessions and Country Courts, and forms a standard to which the administration of justice can be raised in the public view. For this reason it is a matter of regret that the Lords Justices cannot take their turn, say once a year, at civil assizes. They would thereby keep in touch with work at Nisi Prius, while they themselves would not be lost to sight though to legal memory dear, a phrase which inevitably escapes one at the thought that Lord Justice Vaughan Williams and Lord Justice Collins can no longer be numbered among the visible planets in the circuit orbit.

Comment is frequently made on the assumed pettiness of a large proportion of the causes tried at assizes. The answer to that is two-fold. First, it is not for Judges or busy lawyers to estimate what is worth trying, or to consider that such intellectual persons as themselves should only be called upon to deal with important causes. This fallacious idea is based on the assumption that certain Courts are to be deemed "Inferior Courts" on account of the smallness of the subject-matter in dispute to be dealt with by them. The notion is one derogatory to the administration of justice. Courts, whether "Superior" or "Inferior," are constituted to sit and to try whatever disputes individuals may choose to bring before them. Courts are made for suitors, not suitors for Courts. Knowledge by the public that their grievances, real or imaginary to themselves, will be heard and dealt with by skilled lawyers, is of more advantage to the community, and tends to a clearer recognition of the principles of law and order than any "getting through the business" within the shortest possible time. No doubt there is a *via media* whereby a tactful Judge and wise "counsellors" can settle unnecessary disputes but care should be taken that the settlement should be a genuine solatium to all parties and not the forcible "pooh-poohing"

of a case out of Court, a course of action which often merely leaves a rankling sense in the minds of both parties that they have not had a fair hearing from a Court which they themselves have (indirectly) paid for that very purpose. The way in which a case is tried is of greater importance than the subject-matter in dispute, so far as the maintenance of trust in and respect for the administration of justice is concerned ;—*The Law Magazine and Review.*

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Injunction to Restrain an Unlicensed Person from Practising Law.—We learn from the *Chicago Legal News*, (30 Chic. Leg. News, 374.) that a bill in equity was recently filed in the Circuit Court of Cook County, I llinois, by Charles S. Deneen, the State's Attorney, to restrain one B. A. L. Thomson from practising law without procuring a license so to do. The entire bill is printed in the *Legal News.* The action strikes us as being novel. The general rule is that injunctions lie only to protect private rights of property or business. A well recognized exception to the rule is that, in two or three limited classes of cases, injunctions are granted on informations filed by the Attorney-General or other attorney for the government to restrain purprestures of highways, navigations, and the like. This jurisdiction has grown until the injunction is more frequently resorted to than in former times to restrain indictable public nuisances. We do not understand any ground on which the present bill can be supported, unless it be on this last ground, that is to say, upon the ground that, for a person to engage in the practice of law without being duly licensed thereto, is to engage in the commission of a series of acts in the nature of a public nuisance. But is not the case one where there is a plain remedy at law, and where the jurisdiction of equity cannot consequently be invoked? If an unlicensed person files a pleading in court and signs his name to it as an attorney, does he not commit a contempt of court? On the other hand if, being really learned in the law, he gives advice and draws a pleading and procures it to be filed by some person who is an authorized attorney, does he commit an unlawful act? For example, would it be unlawful for a distinguished professor of law in one of our universities to give legal advice, and even to draw a pleading or any other legal paper, so that it be not filed or used of record except by a duly licensed attorney who appears as the attorney of record? We do not believe that the principles of the law put any such restriction upon freedom of action. If we are wrong in this, then it is to be said that the American bar is little better than a medieval guild, and is as odious as a modern business trust ;—*The American Law Review.*

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Zola's Defence: His Impassioned, Dramatic, and Patriotic Appeal to the Jury.—The following are concluding passages of M. Zola's remarkable address to the jury in his first trial as printed in the verbatim report of the London *Times*:—

I am not defending myself, moreover. I leave history to judge my act, which was a necessary one; but I affirm that the army is dishonored when gendarmes are allowed to embrace Major Esterhazy after the abominable letters written by him. I affirm that that valiant army is insulted daily by the bandits who, on the plea of defending it, sully it by their degrading championship, who trail in the mud all that France still honors as good and great. I affirm that those who dishonor that great national army are those who mingle cries of "Vive l'armèe!" with those of "A bas les juifs!" and "Vive Esterhazy!" Grand Dieu! the people of Saint Louis, of Bayard, of Condè and of Hoche, the people which counts a hundred great victories, the people of the great wars of the republic and the empire, the people whose power, grace and generosity have dazzled the world, crying "Vive Esterhazy!" It is a shame the stain of which our efforts on behalf of truth and justice can alone wash off.

You know the legend which has grown up. Dreyfus was condemned justly and legally by seven infallible officers whom it is impossible even to suspect of a blunder without insulting the whole army. Dreyfus expiates in merited torments his abominable crime. And, as he is a Jew, a Jewish syndicate is formed, an international "sans patrie" syndicate disposing of hundreds of millions, the object of which is to save the traitor at any price, even by the most shameful intrigues. And thereupon this syndicate began to heap crime on crime, buying consciences, casting France into a disastrous agitation, resolved on selling her to the enemy, willing even to drive all Europe into a general war rather than renounce its terrible plan.

It is very simple, nay childish, if not imbecile. But it is with this poisoned bread that the unclean press has been nourishing our poor people now for some months. And it is not surprising if we are witnessing a dangerous crisis, for when folly and lies are thus sown broadcast you necessarily reap insanity.

Gentlemen, I would not insult you by supposing that you have yourselves been duped by this fairy tale. I know you; I know who you are. You are the heart and the reason of Paris, of my great Paris, where I was born, which I love with an infinite tenderness, which I have been studying and writing of now for forty years. And I know

likewise what is now passing in your brains; for, before coming to sit here as defendant, I sat there on the bench where you are now. You represent there the average opinion; you try to illustrate prudence and justice in the mass. Soon I shall be in thought with you in the room where you deliberate, and I am convinced that your effort will be to safeguard your interests as citizens, which are, of course, the interests of the whole nation. You may make a mistake, but you will do so in the thought that while securing your own weal you are securing the weal of all.

I see you in your families at evening under the lamp; I hear you talk with your friends; I accompany you into your factories and shops. You are all workers, some tradesmen, others manufacturers, some exercising liberal professions. And your very legitimate anxiety is the deplorable state into which business has fallen. Everywhere the present crisis threatens to become a disaster. The receipts fall off; transactions become more and more difficult. So that the idea which you have brought here, the thought which I read in your countenances, is that there has been enough of this and that it must be ended. You have not gone the length of saying, like many, "What matters it that an innocent man is at the Ile du Diable? Is the interest of a single man worth thus disturbing a great country?" But you say, all the same, that the agitation which we are raising, we who hunger for truth and justice, costs too dear. And if you condemn me, gentlemen, it is that thought which will be at the bottom of your verdict. You desire tranquillity for your homes, you wish for the revival of business, and you may think that by punishing me you will stop a campaign which is injurious to the interests of France.

Well, gentlemen, if that is your idea, you are entirely mistaken. Do me the honor of believing that I am not defending my liberty. By punishing me you would only magnify me. Whoever suffers for truth and justice becomes august and sacred. Look at me. Have I the look of a hireling, of a liar, and a traitor? Why should I be playing a part? I have behind me neither political ambition nor sectarian passion. I am a free writer, who have given my life to labor, who will to-morrow re-enter the ranks and resume my suspended task. And how stupid are those who call me the Italian; me, born of a French mother, brought up by grandparents in the Beauce, peasants of that vigorous soil; me, who lost my father at seven years of age, who did not go to Italy till I was fifty-four. And yet I am proud that my father was from Venice, the resplendent city whose ancient glory sings in all memories. And even if I were not French, would not the forty volumes

in the French language which I have sent by millions of copies throughout the world suffice to make me a Frenchman?

So, I do not defend myself. But what a blunder would be yours if you were convinced that by striking me you would re-establish order in our unfortunate country! Do you not understand now that what the nation is dying of is the obscurity in which there is such an obstinate determination to leave it? The blunders of those in authority are being heaped upon those of others; one lie necessitates another, so that the mass is becoming formidable. A judicial blunder was committed and then to hide it a fresh crime against good sense and equity has had daily to be committed. The condemnation of an innocent man induced the acquittal of a guilty man, and now, to-day, you are asked in turn to condemn me because I gave utterance to my pain on beholding our country embarked on this terrible course. Condemn me, then. But it will be one more fault added to the others, a fault, the burden of which, you will bear in history. And my condemnation, instead of restoring the peace for which you long, and which we all of us desire, will be only a fresh seed of passion and disorder. The cup, I tell you, is full; do not make it run over.

He concluded as follows:—

Dreyfus is innocent. I swear it. I stake my life on it—my honor. At this solemn moment, in the presence of this tribunal which is the representative of human justice, before you, gentlemen, who are the very incarnation of the country, before the whole of France, before the whole world, I swear, that Dreyfus is innocent. By my forty years of work, by the authority that this toil may have given me, I swear that Dreyfus is innocent. By all I have won, by the name I have made for myself, by my works which have helped for the expansion of French literature, I swear that Dreyfus is innocent. May all that melt away, may my works perish if Dreyfus be not innocent. He is innocent. All seems against me—the two Chambers, the civil authority, the most widely circulated journals, the public opinion which they have poisoned. And I have for me only the idea, an ideal of truth and justice. But I am quite calm; I shall conquer. I was determined that my country should not remain a victim of lies and injustice. I may be condemned here. The day will come when France will thank me for having helped to save her honor:—*The American Law Review.*

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Negligence of Telegraph Company; Delay in Delivering Message—Summoning of Surgeon—Proximate Cause for Jury.—In *Western Union*

Telegraph v. *Morris*,—83 Fed. Rep. 992, the United States Circuit Court of Appeals for the Eighth Circuit, in an opinion by Thayer, J., hold that where the testimony of a physician tends to show that a surgical operation might have been avoided, had he reached the patient earlier, it is not error to submit to the jury the question as to whether or not the failure of a telegraph company to properly transmit a message, whereby the physician was prevented from earlier attendance, was the proximate cause of the injuries resulting from such operation:—*The American Law Review.*

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Practice in United States Courts: Taking Deposition—Misconduct of Counsel in Instructing his Witnesses not to Answer.—In the case of *Thomson-Houston Electric Co.* v. *Jeffrey Man. Co.*,—87 Fed Rep. 614, it was held that in taking depositions in an equity suit, counsel cannot assume to pass upon questions of the competency, materiality, and relevancy of testimony, and instruct his witnesses not to answer questions put to them on cross-examination; and where a witness, in obedience to such instructions, refuses to answer, his entire deposition will be stricken from the files:—*The American Law Review.*

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Wife: Right to Action for Inducing Husband to Desert Her.—In the case of *Gernerd* v. *Gernerd*, 39 Atl. Rep. 884, the Supreme Court of Pennsylvania held that, since the statute removing the disabilities of married women, a wife may maintain an action againt one who has wrongfully induced, her husband to leave her. In the opinion of the court written by Fell, J., the reason and learning of the subject are condensed in the following passages;—

The right of a husband to maintain an action against one who has wrongfully induced his wife to separate from him seems not to have been doubted since the case of *Winsmore* v. *Greenbank*. Willes, 577. The right of a wife to maintain an action for the same cause has been denied, because of the common-law unity of husband and wife, and of her want of property in his society and assistance. There was certainly an inconsistency in permitting a recovery when her husband was a necessary party to the action, and she had no separate legal existence or interest, and the damages recovered would belong to him, but the gist of the action is the same in either case. There is no substantial difference in the right which each has to the society, companionship, and aid of the other and the injury is the same whether it affects the husband or the wife.

Where the wife has been freed from her common-law disabilities, and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue:—*The American Law Review.*

REVIEWS.

Tudor's Leading Cases on Real Property, Conveyancing, Construction of Wills, etc., 4th Edition, by T. H. Carson and H. B. Bompas, published by *Butterworth and Co., 7, Fleet Street, London, E. C.*:— Price, £2-10-0. Tudor's Leading Cases on Real Property is a standard law book; and it needs no words of introduction to commend it to our readers. We may, however, note that the editors have taken great pains in bringing out this edition and have given it almost the appearance of a new book. The changes appear to us to be all well-conceived. The editors have exercised a sound judgment in the omission of cases which are mere old learning and in the curtailment of the notes. That a thousand new cases have been added in the notes and yet the size of the book has been reduced by more than two hundred pages proves unquestionably the value of the editorial labor.